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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: JUN 19 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a donut shop. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on April 28, 2001. The proffered wage as stated on the labor certification is $26,400 per year.

With the petition, counsel submitted a copy of the petitioner's

2000 Form 1120S U.S. income tax return for an S corporation. The tax return shows that the petitioner declared a loss of $26,022 as its ordinary income from trade or business activities during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a letter, December 20, 2001, from the petitioner's accountant. The letter states that the petitioner has the ability to pay the proffered wage.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on April 11, 2002, requested additional evidence pertinent to that ability. In addition, the Service Center specifically requested a copy of the petitioner's 2001 tax return and copies of the petitioner's bank statements from April 2001.

In response, counsel submitted the requested copies of the petitioner's bank statements and a copy of the petitioner's 2001 Form 1120S U.S income tax return for an S corporation. The tax return shows that the petitioner declared a loss of $25,222 as its ordinary income from trade or business activities during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

On July 11, 2002, the Director, Texas Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submitted an affidavit dated August 9, 2002 and attested to by the [redacted] and [redacted] the petitioner's owners. In that affidavit, the affiants state the combined value of their savings accounts and retirement accounts and the value of their equity in their home. Further, the affiants state that they will capitalize the petitioner with their own assets as necessary to pay the proffered wage. Counsel also submitted documents from the affiants' bank pertinent to the amounts in their accounts.

Counsel argued that the pledge by the petitioner's owners demonstrates that the petitioner has the ability to pay the proffered wage. Counsel also noted that the average monthly balance in the petitioner's bank accounts never fell below $2,500 and argues that this, too, demonstrates the petitioner's ability to pay the proffered wage.

The petitioner is a corporation. The petitioner's burden is to show that the petitioner, the corporation itself, had the ability to pay the proffered wage when the petition was submitted and has continued to have that ability. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders and their ability, if they wished, to pay the corporations debts and obligations, are irrelevant to this matter. The assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980).

8 C.F.R. § 204.5(g)(2) enumerates the types of evidence competent to show the ability to pay the proffered wage. Bank balances are not among the types of evidence enumerated. In any event, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the petitioner's tax return. The petitioner's checking account balances shall not be considered.

8 C.F.R. § 204.5(g)(2) allows the petitioner to demonstrate its ability to pay the proffered wage with audited financial statements. With the petition, counsel submitted a letter from the petitioner's accountant stating that the petitioner has the ability to pay the proffered wage. The letter is not accompanied by audited financial statements and is not competent evidence of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both Bureau and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner's 2000 tax return shows a loss of $26,022 and negative net current assets. The evidence does not demonstrate

that the petitioner was able to pay the proffered wage of $26,400 during 2000.

The petitioner's 2001 tax return shows a loss of $25,222 and negative net current assets. The evidence does not demonstrate that the petitioner was able to pay the proffered wage during 2001.

The petitioner has not established that it has had the continuing ability to pay the proffered wage since the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.